

Protest of)	
)	Date: January 4, 1991
LUDGATE ENGINEERING CORP.)	
)	
Solicitation No. 41980-90-A-0017)	P.S. Protest No. 90-52

DECISION

Ludgate Engineering Corp. (Ludgate) timely protests the decision of the Postal Service's Philadelphia Facilities Service Center (FSC) not to award it an indefinite quantity contract for architect-engineering services.

On November 6, 1989, the Philadelphia FSC published in the Commerce Business Daily a notice of intent to enter an indefinite quantity contract for architect-engineer (A-E) services for repair and alteration projects in the Allentown/Bethlehem/Easton, PA areas. Interested A-Es were asked to submit completed forms SF 255 and 254 reflecting their qualifications and experience by November 30. The CBD notice did not indicate number of contracts which the Postal Service intended to award.^{1/} Twelve A-Es submitted the required forms. Four firms, including Ludgate, were selected as highly qualified and scheduled for interviews. Proposals were requested from each of the firms.

Negotiations were held in April and May of 1990 with all of the firms.^{1/} Agreements on acceptable rates were eventually reached with the three firms other than Ludgate prior

^{1/}The notice provided that there would be "no guaranteed amount" of work provided for under the resulting contract. This was inconsistent with the direction in Procedure 120.20 of the Design and Construction (D & C) Handbook, which requires that total work ordered under indefinite quantity A-E contracts must not be less than \$5000. Notwithstanding the language in the CBD notice, the contract form used by the FSC provides, in paragraph B.6, that the A-E must provide services up to the "not to exceed" amount of the contract "where the total quantity of work ordered during the term of this contract will not be less than \$5000."

^{2/}Procurement Manual (PM) 11.3.3 b. provides, "Negotiations must be conducted initially with the A-E firm given first ranking" and thereafter with the next highest ranked firm only if agreement cannot be reached with the first. There seems to be no authority for the practice in this case of initiating negotiations with four firms at once.

to May 2, and contracts with each of these firms were executed on May 4. Despite these awards, discussions with Ludgate continued, and on May 22, agreement was reached concerning Ludgate's rates. Ludgate contends that the postal negotiator reached agreement with Ludgate on May 22 as to the terms of a contract and informed Ludgate "that the Postal Service would execute a contract with" Ludgate, and, on July 3, advised Ludgate that an "executed contract should be received" by Ludgate on or before July 13, 1990. However, no contract was executed and by letter of July 27, the contracting officer advised Ludgate that the office's "program requirements have changed due to budget restrictions" and that additional A-E contracts would not be needed.

Ludgate filed a protest with the contracting officer, who forwarded Ludgate's protest to this office on August 24. Ludgate argues that it was "the subject of less than 'good faith negotiations' by the Postal Service" as it had successfully complied with all the prerequisites for this contract, and yet it was not awarded a contract.

The contracting officer submitted a report and a subsequent supplement. We requested that the contracting officer submit additional information, pursuant to PM 4.5.7.i., in order to clarify the issues in this protest. The protester submitted no additional comments in response to the contracting officer's additional report.

In his reports, the contracting officer defends the non-issuance of a contract to Ludgate on the ground that effective July 1, 1990, before a contract was awarded to Ludgate, the capital and expense budgets for the area to be covered by the contract were substantially reduced, reducing the number of repair and alteration projects needing A-E services. As a result, the contracting officer determined that an "additional A/E firm was not required." But for the reduction in budget, Ludgate would have been issued a contract similar to the other three firms. The contracting officer cites the D&C Handbook which explains the selection process for indefinite-quantity contracts.^{1/}

Discussion

As to Ludgate, the contracting officer's action was analogous to a cancellation of the solicitation. Section 4.1.2.j. of the Procurement Manual states in pertinent part:

Solicitations may not be canceled unless circumstances make cancellation essential, such as when there is no longer a requirement for the supplies or services, or the solicitation requires amendments of such magnitude that a new solicitation is needed...

The Philadelphia FSC's substantial reduction in budget was a circumstance consistent with the requirements of PM 4.1.2.j. because it not only changed the office's program requirements but significantly limited its need to contract for additional A-E services.

^{3/} The contracting officer also argues that contrary to Ludgate's allegations of bad faith, the action taken by him was without prejudice or malice and that the decision not to award a contract to Ludgate does not prevent Ludgate from being considered for future Postal Service A-E work.

As there was no longer a requirement for the A-E services, the contracting officer reasonably concluded in light of the circumstances not to proceed with the award.

As to the protester's allegation of bad faith, this office will not attribute bad faith to a contracting officer without "well-nigh irrefragable" proof of improper action. See Cimpi Express Lines, Inc., P.S. Protest No. 88-57, December 15, 1988. Here, the contracting officer has adequately justified his decision not to issue an award to Ludgate, has stated that this decision was made without prejudice or malice. Absent any evidence of malice or intent to harm the protester, we presume the contracting officer's action to be in good faith. Jenkins, Gales & Martinez, Inc., P.S. Protest No. 88-65, January 26, 1989.

The protest is denied.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

[checked against original JLS 6/22/93]